Supreme Court, U.S.
FILED
SEP 25 1998
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No. 98-271

In The

Supreme Court of the United States

October Term, 1997

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON and CERTAIN LONDON MARKET INSURANCE COMPANIES,

Petitioners,

vs.

INDIANA GAS COMPANY, INC., RICHMOND GAS CORPORATION d/b/a INDIANA GAS COMPANY, INC. and TERRE HAUTE GAS CORPORATION d/b/a INDIANA GAS COMPANY, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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STATEMENT

Petitioners, Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies, submit this brief in reply to the opposition filed by Respondents to the Petition for Writ of Certiorari.

The most significant statements in Respondents' Brief in Opposition are their concessions that: (a) the decision of the court below is incorrect; and (b) there is a direct conflict between the circuit courts in this jurisdictional issue with respect to which there is a great deal of continuing litigation.[1] For example, counsel has become aware of a Central District of California case involving Underwriters at Lloyd's which was dismissed for lack of diversity jurisdiction. *National Am. Ins. Co. of California, et al. v. Certain Underwriters at Lloyd's, London*, No. 97-6095 CM (C.D. Cal. July 28, 1998). Indeed, the very day that this Petition for Writ of Certiorari was docketed by the clerk, the District Court of New Jersey ruled that each Name's citizenship had to be considered in determining diversity. *Trian Group, Limited Partnership et al. v. Accident and Casualty Ins. Co. of Winterthur*, Civil Action No. 98-1026 (D.N.J. August 12, 1998). The district court in that case permitted discovery to be taken to determine with specificity which of the London Market policies were subscribed by non-diverse Names and, if appropriate, to file an amended complaint excluding claims related to such policies. Thus, absent this Court's decision on the issue, there will be continued turmoil in the federal courts on this jurisdictional question.

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1. To the extent it is a concern, this Court may appoint an *amicus* to represent the interests of the Seventh Circuit in defending the decision below. *United States v. Providence Journal*, 485 U.S. 693, 703 (1988).

1. Respondents' first ground for opposition, that Indiana Gas has simply refiled its complaint in state court, is wholly beside the point. Petitioners wish to be in federal court, and the question whether they are entitled to a federal forum is in no way mooted by the state court action.[2] The injury here is the loss of Petitioners' right to a federal forum, as well as the necessity of having to relitigate a fully litigated case. Petitioners had judgment absolute in their favor in the court below.

2. Respondents' second point is that certiorari should not be granted because the issue of diversity jurisdiction involving Lloyd's Underwriters has now been briefed, argued, and submitted for decision in the Second and Third Circuits. As noted above, this is not the kind of issue that justifies continued uncertainty while the question is being litigated in a number of courts. Despite Respondents' efforts to suggest otherwise, the relevant facts are not in dispute; the question is the legal significance of those facts. The sooner the lower courts receive guidance from this Court, the better.

3. As to Respondents' third point, the misunderstanding of the court below is one that is readily apparent on the record. Respondents err when they suggest that the issue of whether or not the Names were defendant parties was not briefed below; in fact, Petitioners took the position that the Syndicates could *not* be parties as they have no legal existence, that the Names were the subscribing parties to the Lloyd's policies of insurance, and that Indiana Gas sued *Certain Underwriters* at Lloyd's, not Syndicates at Lloyd's. (Memorandum in Support of London Market Insurers' Motion to Amend the Amended Answer, at 7-9; London Market Insurers' Petition for Rehearing, at 1; Petition for Writ of Certiorari at 14, 17). Indiana Gas recognized

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2. In fact, on September 22, 1998 the Tippecanoe Superior Court No. 2 orally granted Petitioner's Motion to Stay the state court action pending disposition of federal proceedings. An order is being submitted.

that the Names were parties when it sought to dismiss the non-diverse Name from the litigation. Pet. at 9, App. at 5a.

The Seventh Circuit's unsupported citation to unspecified "English law" as supporting the proposition that the Names could not be sued in England may have contributed to its perception that Indiana Gas was not suing the Names in this case.[3] The record speaks for itself; in any event, whether or not Names may be procedurally parties *in England* has nothing to do with their status as parties in this Court.

Thus, the misunderstanding below, while important, is not one that renders the case in any respect "fact-bound" or inappropriate for plenary review. *Cf. California v. Carney*, 471 U.S. 386, 396 (1985) (Stevens, Brennan and Marshall, J.J., dissenting).

4. Respondents next contend that the second question presented for review was not properly before the court of appeals because it was raised for the first time in the petition for rehearing. While it is correct that arguments not contained in an appellate brief will not normally be considered, it must be kept in mind that subject matter jurisdiction was not an issue until *after* the appeal was briefed. Since neither Respondents *nor* Petitioners contended that the syndicates were unincorporated associations, the first time the issue of Fed. R. Civ. P. 23.2 was presented was when the original decision of the court of appeals was rendered.

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3. The Seventh Circuit may have been confused by cases in which an English court forbade a Name from proceeding contrary to the contracts under which complete claims control, including control over litigation, had been delegated to the managing agent. *Daly v. Lime Street Underwriting Agencies Ltd.*, [1987] 2 FTLR 277 (Q.B.). If anything, such decisions would militate in favor of recognizing the Active Underwriters as analogous to *Navarro* trustees.

Moreover, the issue of subject matter jurisdiction is one of the exceptions to the general rule against new grounds being advanced in a petition for rehearing. *Escobar Ruiz v. Immigration and Naturalization Serv.*, 813 F.2d 283, 286 n.3 (9th Cir. 1987), *reh'g granted*, 838 F.2d 1020 (9th Cir. 1988). Since a court of appeals has an "obligation to explore any promising avenue to the District Court's jurisdiction, whether or not it is suggested by the parties", *Association of Am. Medical Colleges v. California*, 569 F.2d 101, 111 (D.C. Cir. 1977); *Curley v. Brignoli, Curley & Roberts Associates*, 915 F.2d 81, 85 (2d Cir. 1990), *cert. denied*, 499 U.S. 955 (1991), the issue of the applicability of Rule 23.2 had not been waived and was appropriately raised in the petition for rehearing. Moreover, the court of appeals had the authority to consider the issue *sua sponte* (as did the Second Circuit in *Brignoli*[4]). Indeed, as the court of appeals could have amended the complaint *sua sponte*, even though Indiana Gas had not used Rule 23.2 initially, it did not preclude the Seventh Circuit's consideration of the issue.

Perhaps recognizing this, the court below fully considered the merits of the argument. It is thus ripe for this Court's review.

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4. *Brignoli*, 915 F.2d at 87. Similarly, this Court has considered grounds not originally advanced in the certiorari briefing when the ground is a "predicate to an intelligent resolution" of the case, and is "fairly included therein", citing to S. Ct. R. 14.1. *Ohio v. Robinette*, 117 S. Ct. 417, 420 (1996); *Caterpillar v. Lewis*, 117 S. Ct. 467, 476 n. 14 (1996).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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